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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEBORAH L. BUNDY,)	Case No. ED CV 12-1052-PJW
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	
)	
CAROLYN W. COLVIN,)	
ACTING COMMISSIONER OF THE)	
SOCIAL SECURITY ADMINISTRATION,)	
)	
Defendant.)	

I. INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying her claims for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). She claims that the Administrative Law Judge ("ALJ") erred when he: 1) rejected her treating doctor's opinion that she could not work; 2) failed to properly develop the record; and 3) assessed Plaintiff's residual functional capacity. For the reasons discussed below, the Court concludes that the ALJ did not err.

II. SUMMARY OF PROCEEDINGS

In February 2009, Plaintiff applied for DIB and SSI, alleging that she was disabled due to bipolar disorder and the side effects of

1 her bipolar medication, primarily sleepiness and an inability to
2 concentrate. (Administrative Record ("AR") 49-50, 80-81, 119-29, 135,
3 143, 164-65.) Her applications were denied initially and on
4 reconsideration. She then requested and was granted a hearing before
5 an ALJ. On December 14, 2010, she appeared with counsel and testified
6 at the hearing. (AR 37-64.) The ALJ denied the applications in
7 January 2011. (AR 12-22.) Plaintiff appealed to the Appeals Council,
8 which denied review. (AR 1-3, 5, 8.) This action followed.

9 III. ANALYSIS

10 A. The ALJ's Rejection of the Treating Psychiatrist's Opinion

11 Plaintiff's treating psychiatrist, Marianne Soor-Melka, diagnosed
12 Plaintiff with bipolar disorder and treated her with Abilify,
13 Wellbutrin, and Depakote. (AR 395.) Though this medication
14 controlled Plaintiff's bipolar disorder, according to Dr. Soor-Melka,
15 Plaintiff was still unable to work. (AR 395.) The ALJ discounted
16 this opinion because it was an opinion of disability, which is
17 reserved to the Agency, and because it was inconsistent with the
18 medical evidence and Dr. Soor-Melka's statements that claimant was
19 stable on her medications. (AR 20.) Plaintiff contends that this was
20 error. For the following reasons, the Court disagrees.

21 It is well-established that, "[b]y rule, the Social Security
22 Administration favors the opinion of a treating physician over non-
23 treating physicians." *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir.
24 2007); *see also Aukland v. Massanari*, 257 F.3d 1033, 1037 (9th Cir.
25 2001); and *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996). A
26 treating physician's opinion as to the nature and severity of an
27 impairment must be given controlling weight if the opinion is well
28 supported and not inconsistent with other substantial evidence. SSR

1 96-2p; *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001). This
2 rule does not apply, however, to a treating doctor's opinion regarding
3 the ultimate issue of disability. *Batson v. Comm'r of Soc. Sec.*, 359
4 F.3d 1190, 1195 (9th Cir. 2004) (noting treating physician's opinion
5 is "not binding on an ALJ with respect to the . . . ultimate
6 determination of disability."); 20 C.F.R. § 404.1527(e)(3); see also
7 SSR 96-5p (explaining opinion that claimant is disabled, "even when
8 offered by a treating source, can never be entitled to controlling
9 weight or given special significance").

10 The ALJ was not bound to accept Dr. Soor-Melka's opinion that
11 Plaintiff could not work because it was not a medical opinion but was,
12 instead, an opinion of disability. The ALJ was also not required to
13 accept the opinion because it was not supported by Dr. Soor-Melka's
14 records or her statements. There was no question that Plaintiff's
15 bipolar disorder was completely controlled by her medications. Dr.
16 Soor-Melka said so in her opinion and Plaintiff testified that this
17 was the case at the administrative hearing. (AR 49-50, 395.) Thus,
18 Plaintiff's disability claim was not really premised on her bipolar
19 disorder but on the alleged fatigue caused by her bipolar medications.
20 Plaintiff claimed that she regularly went to bed at 8:00 or 9:00 at
21 night and slept until 11:00 a.m. or noon the following day. (AR 50.)
22 According to Plaintiff's friend, she was only able to function three
23 to four hours a day. (AR 179.) But the evidence simply did not
24 support these claims of fatigue. According to Dr. Soor-Melka's chart
25 notes, she asked Plaintiff on almost every single visit if she was
26 experiencing side effects from her medications and Plaintiff reported
27 almost every single time that she wasn't. (AR 294-319, 353-77, 386-
28 94.) Plaintiff never reported that she was sleeping as much as 16

1 hours a night, every night. Thus, the ALJ did not err in rejecting
2 Dr. Soor-Melka's opinion because there was no support for it in the
3 doctor's records and because it was inconsistent with the doctor's
4 opinion that Plaintiff was stable on her meds. See *Tonapetyan v.*
5 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (rejecting treating
6 physician's opinion because it was "conclusory and brief and
7 unsupported by clinical findings"); *Magallanes v. Bowen*, 881 F.2d 747,
8 751-54 (9th Cir. 1989) (upholding ALJ's rejection of treating doctor's
9 opinion that was contradicted by evidence in the record).

10 B. Development of the Record

11 At the close of the administrative hearing, the ALJ told
12 Plaintiff and her counsel that he needed additional records from Dr.
13 Soor-Melka to support Plaintiff's claim that she was sleeping for "18
14 hours a day." (AR 61.) The ALJ agreed to leave the record open for
15 30 days to allow Plaintiff and her counsel to submit the records. (AR
16 61-62.) Plaintiff did not submit any additional records. Plaintiff
17 contends that the ALJ erred by not obtaining additional records from
18 Dr. Soor-Melka on his own and seeks remand and an order requiring the
19 ALJ to do so.

20 Plaintiff cites the ALJ's duty to fully and fairly develop the
21 record in support of her argument that the ALJ erred. (Joint Stip. at
22 11.) But, as the Agency points out, that duty can be fulfilled by
23 leaving the record open to allow the claimant to submit additional
24 records. *Tonapetyan*, 242 F.3d at 1150. The Court finds that the ALJ
25 fulfilled that duty here. Not only did he leave the record open for
26 30 days to allow Plaintiff and her counsel to submit additional
27 records, he told counsel that if he could not submit the records on
28 time all he had to do was ask and the ALJ would grant him additional

1 time. (AR 62.) Plaintiff and her counsel never submitted additional
2 records and never asked for additional time. Nor have they presented
3 any records to the Court in the 30+ months since the hearing ended.
4 This is quite telling. The inference the Court draws is that there
5 are no records from Dr. Soor-Melka contradicting the numerous records
6 that have already been submitted from Dr. Soor-Melka establishing that
7 Plaintiff's medications do not cause the severe side effects that she
8 now claims. As such, the Court concludes that the ALJ did not err by
9 failing to pursue these non-existent records and that, even if he did,
10 any error was harmless.¹

11 C. The Residual Functional Capacity Finding

12 As a corollary to her previous arguments, Plaintiff contends that
13 the ALJ failed to properly assess her residual functional capacity.
14 Because the Court has concluded that the ALJ did not err in rejecting
15 Dr. Soor-Melka's conclusion that Plaintiff could not work and in
16 failing to supplement the record, this argument, too, is rejected.
17 The ALJ was not required to include in the residual functional
18 capacity findings the limitations suggested by Dr. Soor-Melka and by
19 Plaintiff because the record did not support them.

24
25 ¹ Plaintiff's counsel complains that it is unclear why
26 additional records from Dr. Soor-Melka were not submitted as requested
27 by the ALJ. (Joint Stip. at 12.) The Court believes that it was
28 incumbent on counsel to walk down the hall and ask her colleague, Mr.
Fox, who represented Plaintiff in the administrative hearing, why
these records were not produced and, if, as the Court suspects, it was
because there were none, to not raise this issue on appeal.

1 IV. CONCLUSION

2 For the reasons set forth above, the Agency's decision is
3 affirmed and the case is dismissed with prejudice.

4 IT IS SO ORDERED.

5 DATED: July 9, 2013.

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8 PATRICK J. WALSH
9 UNITED STATES MAGISTRATE JUDGE